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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1073**

Karl Bennett,
Relator,

vs.

United Parcel Service Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 20, 2010
Affirmed
Collins, Judge***

Department of Employment and Economic Development
File No. 22132085-3

Karl E. Bennett, Jr., St. Paul, Minnesota (pro se relator)

United Parcel Service, St. Louis, Missouri (respondent)

Lee B. Nelson, Amy R. Lawler, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department of Employment and
Economic Development)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Collins,
Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) that he was ineligible to receive unemployment benefits because he had been discharged for employment misconduct based on excessive absences. We affirm.

FACTS

Relator Karl Bennett had been employed by UPS since November 6, 2007, and, at the time of his discharge, was a part-time supervisor. In the summer of 2008, Bennett had attendance problems. His manager spoke with him about this several times, gave him referrals to resources where he could obtain assistance with personal concerns, and allowed him several days' leave to address those concerns. Nonetheless, Bennett continued to have attendance problems, including "no-show/no-calls," in which he was absent without notice to the employer. He received a warning on August 29 that his employment would be terminated if he did not correct the problem.

Before the start of his work day on September 2, 2008, Bennett called his manager to inform him that he would not be able to report to work because he had been bitten by a dog. Although he had been scheduled to work on September 3 and 4 as well, Bennett failed to contact his manager again until more than a week later, when he called and reported that he was in jail. The employer had already discharged Bennett for excessive absenteeism on September 4.

Bennett applied for unemployment benefits but was deemed ineligible based on the determination that he had been discharged for employment misconduct. He appealed

to the ULJ who, after a hearing, reached the same conclusion. The ULJ affirmed on reconsideration and Bennett brought this certiorari appeal.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm or remand, or we may modify or reverse

if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusions, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (2008).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). This court will defer to the ULJ's findings of fact as to the employee's behavior but will review the legal issue of whether the behavior constituted employment misconduct *de novo*. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Bennett argues that he had been unfairly discharged and was not given fair consideration regarding reemployment because he had a management position and the union would not advocate for him as it did for hourly workers who were disciplined. But the question under review is not whether Bennett should have been discharged or even whether he should have been reemployed. Rather, the sole question before us is whether,

having been discharged, Bennett is ineligible for unemployment benefits because he was discharged for misconduct within the meaning of the unemployment-compensation statute. *See Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). Further, the discipline of other employees is not relevant to whether Bennett's behavior constituted employment misconduct. *See Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986).

As to the merits, Bennett argues that he is entitled to benefits because he ultimately contacted the employer to explain why he had been absent from work in early September, 2008. "An employer has the right to establish and enforce reasonable rules governing absences from work," and an employee's refusal to comply can constitute employment misconduct. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). An employee who is absent from work because of incarceration, and who does not contact the employer until after the absence or deceives the employer regarding the reasons for the absence may be considered to have committed employment misconduct. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 291-92 (Minn. 2006). While Bennett did indeed suffer a dog bite as he told his manager, it was not until a week and a half later, after his discharge, that he informed his employer that he was unable to report to work because he had been arrested and jailed for fleeing a police officer, of which he was later convicted. Thus, as the ULJ ruled, the reason for Bennett's final no-call/no-shows was a matter within his control; had he been law abiding, he would not have been jailed and missed work. We agree and affirm the determination that

Bennett had been discharged for employment misconduct and is ineligible to receive unemployment benefits.

Affirmed.